UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV15-01601 JAK (ASx)	Date	May 23, 2017
Title	Viola Hubbs v. Big Lots Stores, Inc., et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE PLAINTIFF'S MOTION FOR CLASS CERTIFICATION (Dkt. 87)**

DEFENDANT'S MOTION TO EXCLUDE EXPERT TESTIMONY OF KEITH MENDES (Dkt. 100)

I. Introduction

In this putative class action, certain current and former employees of Big Lots Stores, Inc. and PNS Stores, Inc. ("Defendants") have brought wage and hour and related claims. They have done so on behalf of certain classes of those who worked in non-exempt hourly positions at Defendants' "Big Lots" retail stores in California during a specified time period. The named plaintiffs are Brandon Coleman ("Coleman") and Tamika Williams ("Williams"), who were employed at a Big Lots store in San Bernardino, California, and Viola Hubbs ("Hubbs"), who employed at a Big Lots store in Los Angeles. Letty Jeric, a Regional Human Resources Leader for Big Lots, has declared that it had 156 stores in California as of March 2017. Jeric Decl., Dkt. 96-5 ¶ 3. Hubbs filed this action in the Los Angeles Superior Court. Compl., Dkt. 1-1 at 7. Defendants removed the action under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §1332(d). Dkt. 1. On October 26, 2015, Hubbs, Coleman and Williams (collectively "Plaintiffs") filed the Second Amended Complaint ("SAC"), which remains the operative one. Dkt. 56.

The SAC advances the following ten causes of action under California law: (i) Unpaid Overtime under Cal. Lab. Code §§ 510, 1198; (ii) Unpaid Minimum Wages under Cal. Lab. Code §§ 1194, 1197, 1197.1; (iii) Unpaid Meal Period Premiums under Cal. Lab. Code §§ 226.7, 512(a); (iv) Unpaid Rest Period Premiums under Cal. Lab. Code § 226.7 (v) Non-Compliant Wage Statements under Cal. Lab. Code § 226(a); (vi) Failure Timely to Pay Wages Upon Termination under Cal. Lab. Code §§ 201 and 202; (vii) Failure to Pay Wages During Employment under Cal. Lab. Code § 204; (vii) Failure to Compensate for Split Shifts under Cal. Lab. Code §§ 1197, 1198 and 8 Cal. Code of Reg. § 11070; (ix) Violation of Cal. Lab. Code §§ 2698 *et seq*. ("PAGA"); and (x) Violation of Cal. Bus. & Prof. Code §§ 17200 *et seq*. ("UCL").

On February 8, 2017, Plaintiffs moved to certify six classes pursuant to Fed. R. Civ. P. 23(a) and (b) ("Motion" (Dkt. 87)). Defendants opposed the Motion (Dkt. 96), and Plaintiffs replied (Dkt 106). On March 27, 2017, Defendants filed a separate motion to exclude the testimony of Keith Mendes, an expert

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV15-01601 JAK (ASx)	Date	May 23, 2017
Title	Viola Hubbs v. Big Lots Stores, Inc., et al.		

witness presented by Plaintiffs.("Motion to Exclude" (Dkt. 100)). Plaintiffs opposed the Motion to Exclude (Dkt. 107) and Defendants replied. Dkt. 111.

A hearing on both motions was held on May 15, 2017, and the matters were taken under submission. Dkt. 119. For the reasons stated in this Order, the Motion is **GRANTED IN PART** and the Motion to Exclude is **DENIED**.

II. Analysis

A. Class Certification Standards

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes et al.*, 564 U.S. 338, 348 (2011). Under Fed. R. Civ. P. 23, a class "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). That "rigorous analysis" will "frequently" include "some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 564 U.S. at 351.

To obtain the certification of a putative class the moving parties must establish that the proposed class meets each of the prerequisites of Rule 23(a). *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). These are numerosity, commonality, typicality and adequacy of representation. Fed. R. Civ. P. 23(a). "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 564 U.S. at 350 (italics in original).

If the requirements of Rule 23(a) are met, the next step in the process is to determine whether the standards of Fed. R. Civ. P. 23(b) are satisfied. *See, e.g.*, *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Here, Plaintiff seeks certification under Rule 23(b)(3), which has two requirements: (i) "questions of law or fact common to the class members predominate over any questions affecting only individual members," and (ii) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

B. Application

As stated earlier, Plaintiffs seek the certification of six classes. They are as follows:

> Closing Shift Class [Class One]: All non-exempt employees of Big Lots Stores, Inc. and PNS Stores, Inc. (together "Big Lots") who worked one or more closing shift at any Big Lots store in California between February 7, 2010 and the date of class certification and where Big Lots' recordkeeping systems reflect a gap between the Closing Shift Class Members' end of shift time and the time the store's alarm was set. This class seeks to recover unpaid compensation for time worked after clocking out on closing shifts.
>
> Security Inspection Class [Class Two]: All non-exempt employees of Big Lots who were subjected to security checks at Big Lots stores in California at any time between February

7, 2010 and January 1, 2015. This class seeks to recover unpaid compensation for time spent going through security “bag checks” after clocking out.

UCL Rest Break Class [Class Three]: All non-exempt employees of Big Lots in California who worked shifts longer than 3½ hours at any time between February 7, 2010 and the date of class certification. This class seeks to recover unpaid premiums for missed rest breaks.

Overnight Shift Class [Class Four] and UCL Meal Period Premium Class [Class Five]: All non-exempt employees of Big Lots who worked one or more overnight shifts in California between February 7, 2010 and the date of class certification. These classes are based on the contention that employees on overnight shifts were not permitted to leave the store when it was closed. They claim that because employees were not allowed to leave during meal and rest breaks, those breaks were not compliant with California law, and compensation is owed.

Regular Rate Class [Class Six]: All non-exempt employees of Big Lots who earned quarterly bonuses and worked overtime in California between February 7, 2010 and the date of class certification. Plaintiffs claim that Defendants failed properly to incorporate certain bonus amounts into the calculation of overtime payment, and therefore improperly undercompensated some employees for overtime worked.

See Dkt. 87 at 2-3.

The following discussion considers each of the proposed classes. However, where the same dispositive issue is presented as to more than one proposed class, they are discussed together.

1. Proposed Classes Four, Five and Six

The SAC proposed a single class, defined as “[a]ll individuals who worked for Defendants in a California ‘Big Lots’ retail store in a non-exempt, hourly-paid position, at any time during the period from four years prior to the filing of the initial Complaint until the date of certification.” Dkt. 56 ¶ 17. None of six classes that are now proposed was defined in the SAC. The first three proposed classes are based on allegations that were made in the SAC, and are within the general class definition stated there. That is not the case as to the other three. As noted, the latter three classes are: Class Four -- the Overnight Shift Class; Class Five -- the UCL Meal Period Premium Class; and Class Six -- the Regular Rate class. With respect to each of these classes, the common, dispositive issue presented is whether to evaluate them on the merits and potentially certify them would be unduly prejudicial to Defendants.

Defendants’ counsel, Mark Knueve (“Knueve”), declares that the first time that Plaintiffs provided any notice of the potential definitions for proposed Classes Four, Five and Six was on January 5, 2017. Knueve Decl., Dkt. 96-1 ¶ 8. That is when Knueve received a letter from Plaintiffs’ counsel, Mark Yablonovich (“Yablonovich”). It described the claims that Plaintiffs would seek to have certified. It did not, however, expressly identify any classes related to overnight shifts, or address the impact of quarterly bonuses in overtime calculations, which are fundamental elements of proposed Classes Four, Five and Six. Dkt. 96-4 at 124. Knueve also presents a copy of an email from Yablonovich, which is dated January

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV15-01601 JAK (ASx)	Date	May 23, 2017
Title	Viola Hubbs v. Big Lots Stores, Inc., et al.		

13, 2017. *Id*. at 125. It states that Plaintiffs intended to seek "to certify claims for noncompliant wage statements and final pay violations on a derivative basis." *Id*. It also stated that Plaintiffs would seek to certify "a class of employees who were not provided meal and rest breaks (e.g., employees working overnight shifts as well as employees who worked more than ten hours)." *Id*. However, this email did not includes the details that were presented when the Motion was filed on February 8, 2017. Given that classes Four, Five and Six were not identified in the SAC, these late communications from Plaintiffs' counsel did not give Defendants sufficient time to allow an informed response. Among other things, there was not sufficient time to conduct discovery or gather all relevant internal information prior to the date on which Defendants' opposition was due.

That there was prejudice to Defendants from the late disclosure is confirmed by a consideration of the overall schedule in this matter. This action was filed on February 2, 2014. Following its removal, a scheduling conference was held on June 8, 2015. At that time, the deadline for filing of the Motion was set for November 20, 2015, with any opposition due on January 6, 2016. Dkt. 23. Consequently, the parties were on notice of the need to conduct discovery related to the anticipated motion for class certification. Both sides did so.

As part of discovery, on August 7, 16 and 26 of 2016, Defendants deposed the named Plaintiffs. *See* (Dkt. 96-3 (Coleman), Dkt. 96-4 at 81 (Williams), Dkt. 96-4 at 1 (Hubbs). According to Defendants' counsel, at their respective depositions, each was asked about the claims that had been identified in the SAC. Because there had been no disclosure of the factual premises of proposed Classes Four, Five and Six, no questions were posed on those matters. Instead, at the conclusion of each deposition, each Plaintiff was asked whether he or she had any other information that supported the claims that were being advanced. Each stated that he or she did not. Consequently, Defendants did not pursue other discovery, investigate, confer with managers and other employees, or review internal records as to the claims that now form the basis for proposed Classes Four, Five and Six. Nor did Defendants have the opportunity to consider challenging the merits of such claims on a motion for summary judgment.

Plaintiffs respond that each of these classes arises from one of the ten causes of action in the SAC, and the six classes are simply subsets of the class that was defined in the SAC. They also note that a court has authority to "construe the complaint or redefine the class to bring it within the scope of Rule 23." Wright & Miller, Fed. Prac. & Proc., § 1759, at 130-131 (2008). These arguments are not persuasive. The issue is not whether the SAC may adequately state a claim, but whether its allegations provided sufficient notice to Defendants with respect to the discovery and investigations that would be appropriate to defend the claims and oppose the Motion. Moreover, Defendants conducted discovery of Plaintiffs with respect to the claims that they were asserting. At that time, Plaintiffs had the opportunity to provide clear and express notice of the three challenged classes. They did not do so.

Because there was not timely and adequate notice of the three proposed classes, the Motion is **DENIED** as to their certification.

2. Proposed Class One -- Closing Shift Class

Plaintiffs seek to certify the following class:

> All non-exempt employees of Big Lots Stores, Inc. and PNS Stores, Inc. (together "Big

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV15-01601 JAK (ASx)	Date	May 23, 2017
Title	Viola Hubbs v. Big Lots Stores, Inc., et al.		

> Lots") who worked one or more closing shift at any Big Lots store in California between February 7, 2010 and date of class certification and where Big Lots' recordkeeping systems reflect a gap between the Closing Shift Class Members' end of shift time and the time the store's alarm was set.

Dkt. 87 at 2.

a) Background

Each of the Plaintiffs alleges that he or she was not compensated for certain work performed after clocking out at the end of a closing shift. This allegedly occurred because each had to clock out prior to completing certain closing activities, setting the alarm and locking the door to the store. It would not have been possible to turn on the alarm and then clock out, because the alarm system activated within a minute. Thus, attempting to remain in the store to clock out after setting the alarm would very likely have caused the alarm to sound. *See* Hubbs Decl., Dkt. 87-37 ¶ 4; Williams Decl., Dkt. 87-38 ¶ 4; Coleman Decl., Dkt. 87-39 ¶ 8. Each of the Plaintiffs declares that Defendants' store procedures required employees working closing shifts to remain inside the store until the alarm was turned on in this manner. Dkt. 87-37 ¶ 4 (Hubbs); Dkt. 87-38 ¶ 4 (Williams); Dkt. 87-39 ¶ 7 (Coleman). Each also declares that the doors to the store were locked when the store closed for the day so that they could not leave until the alarm was set and an exit door unlocked. Dkt. 87-37 ¶ 4 (Hubbs); Dkt. 87-38 ¶ 4 (Williams); Dkt. 87-39 ¶ 8 (Coleman).

During the proposed class period, Defendants' relevant policies applicable to the closing and alarm process stated:

> The door must remain locked until the store is open for business; or exiting the store at the end of the night.
>
> There must be at least two associates present during opening and closing; at least one being a key carrying member of management.
>
> Two persons, one member of store management and one associate, must be present at all times when conducting any activity inside a Big Lots store.
>
> The alarm must be set. Notify your DLPM/DM if the alarm cannot be set. The store closing checklist must be completed daily.

See Boas Depo., Dkt. 96-2 at 22-23, 61 (attaching copy of Closing Procedures policy). These policies were also confirmed during discovery. Thus, there was testimony by representatives of Big Lots that a manager and one or two associates remained present to complete closing procedures after the store was closed and its doors were locked. *See id.*; *see also* Coleman Depo., Dkt. 96-3 at 38-39, 40-4 (discussing closing procedures). Dominic Rosario Zuccala, who was deposed regarding the alarm systems, testified that all stores had alarm systems, and generated electronic records identifying the dates and times that the alarms were set, and the names of the employees who activated or deactivated the alarms. Dkt. 87-36 at 14-15.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV15-01601 JAK (ASx)	Date	May 23, 2017
Title	Viola Hubbs v. Big Lots Stores, Inc., et al.		

The policies of Big Lots also state that closing procedures preceding the activation of the alarm and any security checks of employees conducted prior to leaving the store are to be on the clock, and are compensable. *See* Dkt. 93-2 at 8, 20 (Boas: "It's our policy that all work is done on the clock, including bag checks"); Jeric Depo., Dkt. 96-4 at 51 ("Our policy states any work is done on the clock. A bag check would be done on the clock."). Once the security check and pre-alarm closing procedures are completed, the manager and associates go together to a time clock, which is located at the front of the store, and clock out. *See* Dkt. 96-2 at 20 (Boas Depo.); Dkt. 96-4 at 94-95 (Williams Depo.). At that point, the manager sets the alarm by entering a four digit code and pushing an "arm" button. Dkt. 93-2 at 19-23. Dkt. 96-3 at 41 (Coleman Depo.); Dkt. 96-4 at 114-15 (Zuccala Depo.). Once the alarm has been set, Zuccala testified that associates are required to leave the store within approximately 45 seconds, after which the alarm activates. Dkt. 96-4 at 117.

The named Plaintiffs have testified that the time to set the alarm was ordinarily "a couple seconds" (Dkt. 96-4 at 94 (Williams)) or "about a minute" (Dkt. 96-3 at 41 (Coleman)). Defendants have also submitted the declarations of many employees who worked closing shifts and experienced this process. *See* Dkt. 96-11 (collecting declarations).[1] Each declares that he or she left a store no more than a minute after clocking out. However, each of the named Plaintiffs declares that additional time spent in the store on closing shifts, including time to conduct security checks, was unpaid, contrary to Defendants' stated policies. Dkt. 87-37 ¶ 6 (Hubbs); Dkt. 87-38 ¶ 6 (Williams); Dkt. 87-39 ¶¶ 6-7 (Coleman).

Zuccala testified that two third party contractors maintain the alarm systems at Big Lots stores. Dkt. 96-4 at 111, 120. The clocks that are part of the system in which employees "clock in" and "clock out," of work each day, are not synchronized with the clocks that are integrated into the alarm systems. *Id.* at 121-22. Nor are the clocks in the alarms in different retail locations synchronized. *Id.* at 118-119. Jeric declares that the third parties that maintain alarm records have not provided complete records to Plaintiffs. She states that the records for periods of several months have not been provided for each store. Dkt. 96-5 ¶ 11.

b) 23(a) Analysis

(1) Numerosity

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." Plaintiffs argue that the numerosity requirement is satisfied as to this class. In support of this position they rely on the analysis of Keith Mendes ("Mendes"). He is a professional analyst and consultant whom Plaintiffs engaged as an expert. *See* Mendes Decl., Dkt. 87-40. Mendes declares that he has been provided with copies of timekeeping records and alarm records. *Id.* ¶ 20. On the basis of his review and analysis of these records, Mendes declares that "at least 953 individuals" meet the class definition. *Id.* ¶ 21. Defendants do not contest that the class as defined is sufficiently numerous to satisfy this requirement.

[1] Plaintiffs object to Defendants presentation of these "happy camper" declarations from employees and putative class members. They note that such declarations are inherently unreliable due to the incentives that such employees have to serve the interests of the employer even if that means being untruthful. The objections are addressed in a separate order. These concerns have been considered in assessing the reliability of the challenged statements.

(2) Commonality

This requirement is satisfied only by showing that there is a common question "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. Because there is an overlap between this issue and "predominance," the discussion of commonality is set forth below in the analysis of predominance under Rule 23(b)(3).

(3) Typicality and Adequacy of Representation

Fed. R. Civ. P. 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." "[T]he typicality requirement is permissive and requires only that the representative's claims are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010).

Coleman and Williams each declares that he or she worked closing shifts without receiving full compensation. Both fit within the definition of the Closing Shift Class. Their claims are typical because they arise out of the same course of conduct that gives rise to the claims made on behalf of the class. Furthermore, because their claims and interests are coextensive with those of the class, they are adequate class representatives.

c) Rule 23(b)

As noted, under Rule 23(b)(3), Plaintiffs must show that common questions of law or fact predominate and that a class action would be superior to other available methods for adjudicating the controversy. Plaintiffs argue that both requirements are satisfied. They contend that Defendants' liability will require the determination of two issues: (1) whether compensable work was performed by class members between when they clocked out and left the store; and (2) whether Defendants knew or should have known that class members were performing such off-the-clock work. Plaintiffs argue that a determination of these issues turns on an analysis of Defendants' policies and procedures. Plaintiffs also contend that the same policies are in place at each of Defendants' stores. Therefore, common proof will be used in conducting the necessary analysis.

Plaintiffs also propose that the amount of uncompensated time can be calculated by comparing the recorded time of when an employee clocked out and records of when the alarm was activated that evening. Mendes declares that, based on an analysis of these records for 24,728 days, he has calculated this time differential as to a subset of class members, *i.e.,* those who worked at approximately ten percent of Big Lots stores in California. Dkt. 87-40 ¶ 29. He states that his analysis shows that for the members of this class, which does not include managers, the daily mean and median time worked off the clock at the end of each shift was 2.4 and 2 minutes, respectively. *Id*. The most common amount of time worked off the clock was one minute. *Id*. This conclusion is consistent with Defendants' claim that employees clocked out and then promptly set the alarm and left the store -- a process that took approximately one minute. Plaintiffs argue that a similar analysis could be conducted to assess the amount of time worked without compensation by all class members.

Defendants argue that Plaintiffs have, at most, shown that there were isolated instances when the policies were not followed, and bag checks or other closing work was conducted off the clock. Defendants' formal policies required that employees be compensated for work performed during closing shifts. Defendants' representatives testified that this included the time spent awaiting bag checks. Defendants have submitted numerous declarations from those who would be members of this proposed class stating that these policies were followed. Consequently, Defendants contend that individual issues, not classwide ones, predominate.

Defendants also argue that Mendes' analysis as to the amount of time between when employees clock out and leave the store is not reliable. This argument is based on the aforementioned evidence that the time settings in the time clocks and alarms are not synchronized. From this, Defendants contend that Mendes' comparison of times from the two systems is not accurate or reliable. In support of this position, Defendants note that on 2021 of the worker days analyzed by Mendes -- approximately 8.1% of those analyzed -- the final check out time was later than the timestamp for when the alarm was activated. As noted, it is not reasonable to assume that employees could clock out after activating the alarm. This supports the view that the clocks in the systems were not synchronized, raising general issues about the reliability of using them to calculate the time differential between clocking out and activating the alarm. Defendants add that alarm records for some days or locations may not be available. Therefore, Defendants contend that common proof is not available as to the claims of the proposed class.

Defendants concede, however, that the time between when an employee clocked out and left after activating the alarm was unpaid. Defendants also concede that this unpaid period was approximately one minute per employee for each shift. Therefore, whether this uncompensated time is the result of a policy to deny wages is a question subject to common proof.

Further, even if the clocks in the time and alarm systems were not synchronized, as Defendants contend, they present a means of evaluating the amount of time that most, if not all employees spent between clocking out and activating the alarm. There is limited evidence as to whether the two time systems were accurate, including the aforementioned 8.1% of the time entries in which the activation preceded the clocking out. However, this is not dispositive. Defendants had incentives to have the clock in each system set to the correct time. An accurate time clock would facilitate timely arrivals and departures by employees, many of whom presumably had electronic devices with accurate time settings. Similarly, an accurate time setting in the alarm system could facilitate investigations of incidents in which the alarm sounded due to what may have been criminal activity. The testimony of Zuccala is consistent with this assessment. He testified that the alarm records are used in police investigations and in connection with the defense of employees' wrongful termination claims. Dkt. 106-5 at 5. Plaintiffs also note that 8 Cal. Code Reg. § 11070(7)(A), mandates that California employers keep accurate time records. Therefore, the time records from the two systems may be sufficient to establish on a classwide basis the amount of uncompensated time that is at issue.

Defendants also argue that the time worked off the clock by putative class members was de minimis, and is not compensable under California law. They argue that this shows that the claims are not common, because they turn on the amount of time that each class member spent during one or more pay periods. This issue was addressed in the order issued on Defendants' motion for summary judgment:

> Under the Fair labor Standards Act ("FLSA"), 29 U.S.C.A. § 201 *et seq.*, 213(b)(1), a claim

for lost wages must be for an amount that is not trivial. *See Lindow v. United States*, 738 F.2d 1057, 1061–62 (9th Cir.1984).
. . .

In determining whether certain actions are de minimis and not compensable, the Ninth Circuit has considered three factors: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Rutti v. Lojack* Corp., Inc., 596 F.3d 1046, 1057 (9th Cir. 2010) (quoting *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984)). Although the *Lindow* test was established in connection with claims arising under the FLSA, it has been applied to claims arising under California law.

Summary Judgment Order, Dkt. 118 at 9.

That order concluded that there was no genuine issue of fact that Hubbs had worked only a de minimis amount of time after clocking out. *Id*. at 10. Defendants argue that a similar result is likely to apply as to many or all of the other putative class members. Defendants also argue that the determination of damages would be an individualized issue. However, the affirmative defense of de minimis time is one on which Defendants have the burden of proof. As noted above, there appears to be a means of measuring the amount of off-the-clock time for members of the proposed class. It has not been shown that all or most of them worked only a de minimis amount of time. Furthermore, the analysis provided by Mendes may facilitate the determination on a classwide basis whether time was de minimis. "Although it may be difficult to determine the actual time . . . it may be possible to reasonably determine or estimate the average time." *Rutti v. Lojack Corp*., 596 F.3d 1046, 1059 (9th Cir. 2010) (addressing claim of unpaid wages under Fair Labor Standards Act). Elements of the *Lindow* test can be presented and determined on a classwide basis. This includes evidence as to the practical administrative difficulty of recording additional time as well as the regularity of the work.

Therefore the Motion is **GRANTED** as to the proposed closing shift class.

3. Proposed Class Two -- Security Inspection Class

Plaintiffs seek to certify the following class: "All non-exempt employees of Big Lots who were subjected to security checks at Big Lots stores in California at any time between February 7, 2010 and January 1, 2015." Dkt. 87 at 2.

a) Background

Defendants' security policy requires that "[e]ach time an associate exits the store with a bag, briefcase and/or box, a bag check must be completed." Dkt. 87-12 (Bag Check Policy). The policy also states that it is "the associate's responsibility to present all bags, briefcases and/or boxes for inspection upon leaving the store." *Id*. These bag checks generally took place near the entry areas of each of Defendants' stores. In general, the checks were completed quickly. Hubbs testified that they took only two to three seconds. *See* Dkt. 96-4 at 11.

Defendants' policy required that bag checks be conducted "on the clock." Boas and Jeric testified that a check of an employee's bag(s) was to be performed before the employee clocked out. Dkt. 93-2 at 8, 21 (Boas); Dkt. 96-5 at 1-3 (Jeric). Defendants have submitted declarations from current employees that are similar. They state that bag checks were generally on the clock, and took only a few seconds. *See* Dkt. 96-11.

Plaintiffs have submitted contrary declarations. For example, Coleman declares that bag checks were always off the clock. Dkt. 87-39 ¶ 6. As noted above, the other Plaintiffs have declared that closing shift bag checks were uniformly off the clock. Hubbs also declares that sometimes non-closing bag checks were off the clock, particularly when a manager was not available to conduct the bag check prior to when employees were to clock out. Dkt. 87-37 ¶ 5.

b) Rule 23 Analysis

Plaintiffs argue that common claims predominate because the central issue is whether Defendants had a uniform policy of requiring employees to undergo bag checks after they had clocked out. Plaintiffs identify what they contend are common questions that support this position:

1. Did Big Lots have a policy requiring employees to undergo security checks upon exiting the store?

2. Were security checks conducted at the doors necessarily done without compensation?

3. Is Big Lots required to compensate employees for security checks?

Dkt. 87 at 21.

Plaintiffs argue that there is a common question as to the entire class because, after clocking out, all employees were required to wait in line as bag checks were completed, even if they did not have bags. Plaintiffs have presented examples of entries from "Bag Check Logs" that suggest that there were security checks for employees who were not carrying bags. *See* Yablonovich Decl., Dkt. 87-1 ¶¶ 23-27. Bag Check Logs are completed forms that state the name of an associate who has undergone a check, the time that the check took place and whether the associate was carrying either a purchased item or other parcel. *Id.* Plaintiffs also argue that a comparison between clock out times and the times recorded on Bag Check Logs shows that the security inspections generally took place after employees had clocked out. *Id*.

Defendants have presented evidence to support the position that not all employees were subject to bag checks. Boas, who supervises the California Big Lots stores, testified that employees who are not carrying bags as they prepare to leave a store are not subjected to bag checks. *See* Dkt. 96-2 at 41-42. He also stated that, in his experience, most employees do not bring bags to work. *Id.*[2] Plaintiffs also testified that employees without bags were not subjected to bag checks, and could leave immediately after clocking out unless they were working closing shifts. *See* Dkt. 96- at 96 (Williams); Dkt. 96-4 at 6 (Hubbs); Dkt. 96-3 at 33-34 (Coleman).Coleman testified that he did not bring bags to work, and was not

[2] His testimony on this issue did not specifically address whether employees, particularly women, brought some form of a pocketbook to work.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV15-01601 JAK (ASx)	Date	May 23, 2017
Title	Viola Hubbs v. Big Lots Stores, Inc., et al.		

subject to any bag checks. Dkt. 96-3 at 30.[3] Hubbs and Coleman both testified that, on certain occasions, employees could avoid bag checks by leaving their bags in their vehicles. *See* Dkt. 96-4 at 9, 11; Dkt. 96-3 at 30. Jeric testified that “not all stores conduct bag checks.” Dkt. 96-4 at 50. Defendants have submitted declarations from several current employees who state that not all stores conduct bag checks. *See* Dkt. 96-11.

Plaintiffs have not presented sufficient evidence to show that there was a common and consistent policy among Defendants to subject all employees at all of their stores to off-the-clock bag checks. Plaintiffs have only presented limited evidence that supports the position that managers at certain stores may have required off-the-clock bag checks. This is not sufficient to warrant certification. Individual issues, not common ones, predominate. These issues include: (1) whether an employee was subject to a bag check; (2) whether the bag check was on the clock; and (3) whether the amount of time allocated to the bag checks was de minimis. Other courts have rejected certification of proposed classes where similar evidence was presented. *See Ogiamien v. Nordstrom, Inc.,* No. 2:13-CV-05639-ODW, 2015 WL 773939, at *5 (C.D. Cal. 2015) (denying certification was based on alleged uncompensated bag checks, when evidence suggested that employees could avoid bag checks by not bringing bags to work, expert report and employee declarations showed that checks were conducted randomly, and most employees left the stores without being subjected to bag checks); *Quinlan v. Macy's Corp. Servs., Inc.*, (No. 12–00737–DDP), No. 12–00737, 2013 U.S. Dist. LEXIS 164724 (C.D. Cal. 2013) (common claims did not predominate as to proposed bag check class when checks were only conducted as to employees who brought bags); *compare Frlekin v. Apple Inc.,* 309 F.R.D. 518, 526 n.3 (N.D. Cal. 2015), leave to appeal denied (Oct. 20, 2015) (certification of bag check claim was appropriate, distinguishing cases denying certification because in each of those cases the employer “lacked ‘a specific companywide policy that would give rise to liability.’”).

At the hearing on the Motion, Plaintiffs proposed to address the commonality issues by re-defining the proposed class as “all employees subject to security inspections after clocking out.” Plaintiffs proposed that the class members could self-identify and opt in to the class. Alternatively, Plaintiffs suggest that members of the putative class could be identified from the bag check logs kept in some of the stores and on which their names appear. Defendants respond that Bag Check Logs are not available for many stores. Hubbs testified that she never saw or completed a log while employed. Dkt. 96-4 at 24-25. Coleman testified that the use of bag check logs ended in early 2015. Dkt. 96-3 at 36 (“they just sent an e-mail, said ‘[s]top using the bag check log’”). Boas testified that Bag Check Logs are “not a program that . . . is universally in place,” and were not used at every store. Dkt. 96-2 at 29.

Defendants’ formal policies support their contention that security checks were to be performed on the clock. Furthermore, testimony presented by Plaintiffs is consistent with the claim that many employees were not subjected to bag checks, and that they were not performed at all stores. The lack of a consistent policy about the use of bag check logs, or the information that was recorded, shows that such logs would not be a suitable means of identifying potential class members. Therefore, Plaintiffs have not shown that the members of this putative class can be reliably identified, that there are a sufficient number of them to satisfy the numerosity requirement, that the alleged failure to provide compensation was the result of a

[3] A declaration from Coleman has also been submitted that makes statements that are inconsistent with his deposition testimony. Dkt. 87-39 ¶ 6. It states that he was subject to bag checks whenever he left the store, regardless of whether he had a bag. *Id*.

common policy or that there was a common policy that bag checks be performed after employees had clocked out. Consequently, the requirements of Rule 23 as to commonality, predominance, numerosity, manageability and superiority have not been shown.

For the foregoing reasons, the Motion is **DENIED** as to Plaintiffs' proposed Security Inspection Class.

4. Proposed Class Three -- UCL Rest Break Premiums Class

Plaintiffs seek to certify the following class: "All non-exempt employees of Big Lots in California who worked shifts longer than 3½ hours at any time between February 7, 2010 and the date of class certification." Dkt. 87 at 2.

a) Background

Plaintiffs allege that Defendants did not inform them of the California rules governing the entitlement to rest breaks, and were not compensated when such breaks were missed. Cal. Lab. Code § 512(a) provides: "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes . . . ." Further, under the corresponding regulations,

> [e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

8 Cal. Code Reg. § 11020(12)(A).

Parallel requirements are set forth in Cal. Lab. Code § 226.7(c):

> If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, . . . the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

Because these are remedial statutes, they are "to be liberally construed with an eye to promoting such protection." *Brinker Rest. Corp. v. Sup. Ct.*, 273 P.3d 513, 527 (Cal. 2012).

Defendants' rest break policy, which is set forth in the Big Lots Associate Handbook, states that legally required rest breaks must be provided. Jeric testified that management is informed of this policy, and human resources personnel check to confirm that employees are taking the required breaks. Dkt. 96-4 at 34. The Handbook also states that employees may inform managers if they were required to miss any breaks to fulfill their work responsibilities, and that such complaints should be addressed. Dkt. 87-10 at 5. Jeric provided similar testimony. Dkt. 96-4 at 37. Certain officers of Defendants also testified that, under the policy of Big Lots, a penalty is imposed and paid if a break is missed because an employee was required to provide services. *See id*. at 49; *see also* Dkt. 96-2 at 32-33 (Boas testimony regarding lunch breaks). That this policy was in place is also supported by the "best practices," of Big Lots. They state that

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV15-01601 JAK (ASx)	Date	May 23, 2017
Title	Viola Hubbs v. Big Lots Stores, Inc., et al.		

an associate who misses a break for any reason is entitled to one hour of penalty pay. Dkt. 96-2 at 70 (Big Lots Best Practices regarding breaks and lunches).

Plaintiffs argue that Defendants have a policy of noncompliance with the legal standards governing rest break premiums. They note that the Handbook does not inform employees that they are entitled to rest break premiums for breaks that are missed. *See* Dkt. 87-10 at 5. It does, however, state that rest breaks must be taken, and should not be interrupted. *Id*. Jeric also testified that Defendants have no written policy or procedure for monitoring rest break violations, because "we don't get complaints for rest breaks." Dkt. 87-35 at 4.

Plaintiffs also argue that evidence of a policy to deny the payment of rest break premiums includes that few, if any, such premiums were paid during the class period. From January 2011 to October 2015, Defendants did not pay any rest break premiums. Dkt. 87-22 (Defendants' response to interrogatory). Furthermore, Mendes declares that, based on an analysis of Defendants' wage records, Defendants never paid a rest break premium to any employee. *See* Dkt. 87-40 ¶ 35. In contrast, Defendants paid thousands of premiums to employees for meal break violations during the same time period. *Id*. ¶ 41. Mendes states that these two outcomes appear inconsistent, and support the inference that rest break premiums that were due were not paid. *Id*. Since Jeric began work at Big Lots in 2011, she was aware of only three complaints about missed rest breaks. Dkt. 96-4 at 30-32. Boas was unaware of any such complaints. Dkt. 96-2 at 33.

b) Rule 23 Analysis

Plaintiffs argue that common claims predominate, because the central issue is whether Defendants had a uniform policy of denying premiums for missed rest breaks. Plaintiffs identify what they contend are common questions that support this position:

> 1. Did Big Lots have a reasonable mechanism to monitor or prevent rest break violations in conjunction with its policy of never paying rest break premiums?
>
> 2. Did Big Lots pay rest break premiums?
>
> 3. Does Big Lots' failure to institute a reasonable mechanism to pay rest break premiums constitute an unfair business practice such that the value of employment of all employees was depressed relative to other retailers?

Dkt. 87 at 25.

Defendants respond that common claims do not predominate because Plaintiffs have not submitted "significant proof" that the entire class, or a substantial portion of it, was subject to an unlawful practice. Defendants' written policy and testimony as to that policy shows that they took certain measures to insure that rest breaks were taken. Plaintiffs have testified that they were generally aware of these policies. Although state law requires that rest breaks be available, it does not require that employees be informed of their right to rest break premiums.

Plaintiffs argue that the analysis by Mendes supports their claim of a uniform plan to deny payment for missed rest breaks. The existence or absence of such a uniform policy is a question subject to common proof. That Defendants did not pay any such premiums for much of the class period is evidence that could support an inference that there was a policy not to pay them. However, the overall evidence that has been presented at this time as to the existence of such a policy is not compelling. To be sure, it could be buttressed by further evidence that may be gathered. Defendants note, however, that Hubbs has not testified that she missed any rest breaks, and Coleman testified that he was not aware of any missed breaks. Other employees provided declarations stating that they were aware of the rest breaks policy, and always took the available breaks. *See* Dkt. 96-11.

Plaintiffs have not shown sufficient evidence of a common policy that violates the applicable California statutes. Furthermore, Plaintiffs have not proposed a viable means of identifying those employees who claim to have missed breaks. Therefore, at present individualized determinations would be required. Mendes proposes that the need for individualized inquiries may be avoided by calculating a "meal period violation rate" which can then be applied to the total shifts eligible for rest breaks. Dkt. 87-40 ¶¶ 38, 41. Missed meal breaks were automatically recorded in Defendants' timekeeping system, and compensation was paid automatically for those violations. *Id*. Mendes proposes that a similar method could be used as to rest breaks. *Id*. However, Plaintiffs have not shown that calculations regarding missed meal breaks are reasonably correlated to missed rest breaks. Thus, Even if a policy were shown, individual inquiries would predominate as to its application. Based on the present evidence, whether employees were denied rest breaks would require individual inquiries. An employer is not liable for denying rest breaks unless it is shown that rest breaks were actually missed by particular employees and that they did not elect to forgo them. *See, e.g.*, *Burnell v. Swift Transportation Co of Arizona, LLC*, 2016 WL 2621616, at *4 (C.D. Cal. May 4, 2016) ("Plaintiffs' meal and rest break certification argument rests on the assumption that [an employer's] failure to maintain an affirmative policy scheduling meal and rest breaks creates a rebuttable presumption that the breaks were not taken. This argument fails because no such presumption exists." (collecting cases)).

When an employer has a facially valid policy, there is a risk that substantial individualized inquiries will be necessary to determine liability. This is grounds for denial of certification. *Flores v. Supervalu, Inc*. affirmed the denial of certification for a putative class asserting the denial of rest breaks notwithstanding the employer's policy allowing such breaks. 509 F. App'x 593 (9th Cir. 2013). *Flores* includes the following statement as to the underlying allegations:

> Flores claimed that although her employer's written meal and rest break policies were facially lawful, the demeanor of some supervisors implicitly compelled employees to forego or interrupt breaks to help customers. The district court correctly found that this claim required examination of "a number of human factors and individual idiosyncrasies" having "little to do with an overarching policy," and thus failed to satisfy Rule 23(b)(3).

Id. at 594. *See also In re: Autozone, Inc.,* 2016 WL 4208200, at *9 (N.D. Cal. 2016) (granting motion to decertify because there was no feasible way to identify those class members who had actually missed rest breaks). This reasoning applies here.[4]

[4] In their Reply, Plaintiffs, for the first time, offer an alternative basis for certification. They argue that Defendants had a policy of precluding employees from leaving the stores during their rest breaks when working overnight shifts. Dkt. 106 at 13. This claim was not previously disclosed to Defendants. Accordingly, it fails for the same reasons

For the foregoing reasons, the Motion is **DENIED** as to the proposed rest breaks class.

C. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties . . . fairly and adequately protect the interests of the class." Plaintiffs' counsel, Mark Yablonovich, declares that he is the principal owner and founder of a law firm, the Law Offices of Mark Yablonovich. Dkt. 87-1 ¶ 50. He declares that one of the firm's primary practice areas is wage and hour class action litigation. *Id*. Yablonovich's declaration lists numerous cases in which he has successfully obtained class certification for various classes, and numerous additional cases in which class settlements were reached. *Id*. ¶¶ 51-52.

Defendants argue that Yablonovich lacks the expertise needed to serve as counsel to the proposed classes. They note that the relevant class action representation experience identified in his declaration refers to work that he performed more than five years ago. They also contend that he is not shown as counsel on the dockets of some of the matters on which he claims to have represented plaintiffs in class proceedings. *See* Dkt. 96 at 30.Defendants also question whether Yablomovich has the resources needed to ensure the zealous representation of the proposed classes. They note that during the year before the Motion was filed, two of his co-counsel have withdrawn and left his firm. *See* Dkts. 57, 76. Defendants also state that Plaintiffs' counsel has "attempted to hire another attorney to assist him with [his] caseload, but has been unable to do so." *See* Dkt. 96-14 at 2 (Decl. of Yablonovich in *Atsiri Cardenas v. Westside AG, Inc*., 1:16-cv-002550-LJO-EPG, dated January 27, 2017, addressing lack of staffing).[5]

Defendants also refer to a prior malpractice action brought against Yablonovich. It alleged that he breached his fiduciary duty to a putative class by entering into a "supplemental settlement agreement" with Wells Fargo on behalf of a class of approximately 600, without adequately informing class members of its terms. *See* Dkt. 96-14 at 15 (Complaint filed in *Cutting v. Yablonovich*). The complaint in that action alleges that Yablonovich "maneuvered to convert the entire $6 million settlement into attorneys' fees," thereby acting against the interests of class members. *Id*. That case remains pending.

Defendants also state that in 2012, the Law Offices of Mark Yablonovich was co-counsel in *Eric Clarke v. First Transit*, Case No. 2:07-cv-06476. Attorneys associated with both firms were accused of violating orders of the court, and Yablonovich's co-counsel was held in contempt. *See* Dkt. 96-14 at 41(judgment of contempt against Initiative Legal Group APC for violation of protective order by using confidential putative class member information to solicit clients for new lawsuit).

Defendants' claims and criticisms of Yablonovich are unpersuasive. There is sufficient evidence that he has the requisite experience and resources to provide effective representation to the proposed classes in this action.

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discussed in § II.B.1, *supra,* as to proposed Classes Four, Five and Six. Further, Plaintiffs have not provided sufficient evidence that supports that this alleged classwide policy was implemented.

[5] Defendants request that the Court take judicial notice of certain filings in other cases involving Plaintiffs' counsel. Dkt. 96-13. Because these filings are matters of public record, judicial notice is appropriate, and is GRANTED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV15-01601 JAK (ASx)	Date	May 23, 2017
Title	Viola Hubbs v. Big Lots Stores, Inc., et al.		

III. Motion to Exclude

A. Background

In support of the Motion for Class Certification, Plaintiffs filed the aforementioned declaration of Mendes. Dkt. 87-40. Mendes declares that he has reviewed various documents produced by Defendants in reaching his opinions. Defendants object and seek to exclude the opinions on the ground that they are not based on an accurate interpretation of the underlying factual record. Defendants also challenge Mendes' methodology. In support of that argument they submit the declaration of their expert, Brendan P. Burke. *See* Burke Decl., Dkt. 96-12.

1. Off the Clock Work

Mendes declares that he conducted an analysis to measure the amount of any off-the-clock work performed by members of the classes. Dkt. 87-40 ¶ 27. As noted above, he did so by comparing timekeeping records and timestamps from security alarm records. *Id.* ¶ 28. On the basis of this information, he determined that the daily mean and median amounts of time worked by employees of the clock were between 2 and 3.4 minutes. *Id.* ¶ 29. Mendes declares that "[a] damage calculation would add the number of minutes worked off-the-clock for each relevant shift to the total time worked for that employee. After assessing whether that time should be counted as regular time, overtime, or double time, the relevant wage for each employee would be applied to that incremental amount of time." *Id.* ¶ 30.

Defendants have objected to this analysis on the grounds discussed above. That discussion is incorporated here.

2. Security Checks

Mendes declares that "Big Lots informs its Associates that security checks occur regularly and daily security check logs confirm that Associates go through a security check regardless if they carry a bag/package." *Id.* ¶ 12. Mendes proposes several methods for measuring the amount of time that class members spent on off-the-clock security checks. *Id.* ¶ 32 These include: (1) an observational study, in which a third party observes the security check process; (2) use of video surveillance footage to observe security checks and off the clock work; and (3) a questionnaire distributed to class members. *Id.*

Defendants object that Mendes erred in assuming that every employee was subject to a bag check, even if he or she was not carrying a bag. As discussed above, Defendants disagree with this premise and have presented certain evidence to support their position. The prior discussion on this issue is incorporated here.

3. Rest Breaks

Mendes also calculated the total number of shifts worked and found that, during the class period, employees collectively worked "389,909 shifts eligible for one rest break and 205,998 shifts eligible for two rest breaks." *Id.* ¶¶ 36-37. Mendes concluded that Defendants have not paid any rest break premiums to employees with respect to any of these shifts. *Id*. ¶ 35. Because no rest premiums were paid, he opined that it was highly probable that rest breaks had been missed, and that the affected employees were not compensated. Mendes estimated the number of rest break violations by applying data as to the percentage of meal periods for which there was not compliance. *Id*. ¶ 39. Mendes estimated that the meal period violation rate was approximately 6%. *Id*. ¶ 40. Mendes stated that applying this figure to the total number of shifts during which employees were eligible for rest breaks was "based on the assumption that the factors that contribute to meal period premiums . . . would also contribute to rest break violations." *Id*. ¶ 41. He found that relying on this assumption, "the expected number of rest period payments that would have been paid would have been 6,789" for the relevant subset of the class. *Id*.

Defendants object that no basis has been provided for the inference that rest breaks were missed at the same rate as meal breaks. Defendants also argue that no evidence has been presented indicating that any individual plaintiff missed a rest break. The prior discussion of these issues is incorporated here.

4. Overnight Shifts and Meal Periods Claim

Mendes used Defendants' published store hours to identify the number of shifts worked by employees after midnight. *Id*. ¶ 44. He identified 22,834 shifts worked by 1021 employees. *Id*. ¶ 35. Mendes concluded that, based on timekeeping and wage records, Defendants did not routinely pay employees any meal period premiums for missed meal periods during overnight shifts. *Id*. ¶ 46. Assuming that such premiums were owed, Mendes concluded that there were 17,655 shifts when 713 employees worked that would qualify for a meal period premium. *Id*.

Defendants argue that these conclusions are based on the premise that employees were not permitted to leave the stores when working overnight shifts. They argue that this premise is contrary to Defendants' policies. Defendants state that associates working overnight shifts were permitted to leave the store during breaks. Defendants' employee handbook states that employees may leave the store during meal periods. Dkt. 96-4 at 75 (Handbook). Boas testified that although the doors were locked during closing hours, he did not believe that any policy was enforced to prevent overnight employees from leaving the store. Dkt. 93-2 at 37-39. Defendants argue that this supports a finding that employees were permitted to leave the store during meal periods. They have submitted additional employee declarations supporting this contention. *See* Dkt. 96-11.

These objections do not go to the accuracy of Mendes' calculations. Instead, they address the merits of Plaintiffs' claims for Classes Four and Five. The question whether Defendants had a policy of denying payment for meal breaks on rest periods is not a central element of the analysis conducted by Mendes.

5. Regular Rate of Pay

Mendes reviewed timekeeping and wage records to determine whether class members were properly compensated for overtime. *Id*. ¶ 51. In this analysis, Mendes assumed that the regular rate of pay for purposes of calculating overtime pay should include any non-discretionary bonuses or incentive pay. *Id*. He determined that Defendants do not incorporate quarterly bonuses into the regular rate of pay. *Id*. ¶ 55.

Defendants argue that Plaintiffs have an incomplete understanding of the way the overtime pay and bonuses interact. Defendants note that the bonuses themselves accounted for the amount of overtime worked. Thus, quarterly bonuses are paid on the basis of the total amount of time worked, including overtime. *See* Dkt. 96-2 at 11, 40, 53 (Bonus Policy). Boas testified that bonuses are calculated as a percentage of total quarterly earnings, which include both regular pay and overtime. Dkt. 96-2 at 40-41; *see also* Dkt. 96-3 at 44 (Coleman: agreeing that overtime was considered in bonus calculation); Dkt. 96-4 at 81 (Williams: agreeing that bonuses were paid “as a percentage of [] quarterly earnings”). On this basis, Defendants argue that Mendes’ analysis is based on an erroneous set of assumptions.

However, Defendants’ objections do not show that Mendes’ analysis is not useful. Thus, Defendants only argue that bonuses are calculated on the basis of overtime worked. However, Mendes’ analysis asserts that the rate of overtime pay does not account for the amount of bonuses. Defendants have not addressed this issue. Furthermore, Mendes’ analysis of overtime pay is not a substantial part of his declaration.

B. Legal Standards

The Ninth Circuit has explained that

> Federal Rule of Evidence 702 governs the admissibility of expert opinion testimony. The rule consists of three distinct but related requirements: (1) the subject matter at issue must be beyond the common knowledge of the average layman; (2) the witness must have sufficient expertise; and (3) the state of the pertinent art or scientific knowledge permits the assertion of a reasonable opinion.

United States v. Finley, 301 F.3d 1000, 1007 (9th Cir. 2002).

A witness who is qualified as an expert by knowledge, skill, experience, training or education may provide evidence through an opinion if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

District courts perform a “gatekeeping” function in determining the admissibility of expert testimony. *Daubert v. Merrell Dow Pharms*., *Inc*., 509 U.S. 579, 597 (1993). A “trial court has broad latitude not only in determining whether an expert's testimony is reliable, but also in deciding how to determine the testimony's reliability.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). In determining the reliability of a proffered expert, courts “scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case.” Fed. R. Evid. 702 Advisory Committee’s Note (2000 Amendment). The trial court must “make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

C. Application

As explained in the prior discussion, each of Defendants' objections is based on a common argument. Thus, Defendants contend that, in reaching his conclusions, Mendes failed to consider certain evidence, misapplied evidence as to factual matters, or did not give certain evidence sufficient weight. Certain of these objections, *e.g.* that Mendes erred in assuming that all employees are subject to bag checks, concerned matters that were of very limited significant to his overall conclusions. Therefore, these objections are not a basis to exclude Mendes' opinions as to the Motion.

In general, Defendants do not contest that the numerical calculations made by Mendes could be reliable if supported by a factual record. Therefore, the objections do not address the reliability of the methodology, but the weight that should be given to the opinions. Again, this is not a basis to exclude the opinions with respect to the Motion.

For the foregoing reasons, the Motion to Exclude is **DENIED**; provided, however, this is without prejudice to motion in limine prior to trial with respect to any proposed testimony of Mendes based on a more complete factual record as to the matters discussed in this Order.

IV. Conclusion

For the foregoing reason, the Motion for Class Certification is **GRANTED IN PART**. The Motion to Exclude is **DENIED**.

IT IS SO ORDERED

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